WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
SEPTEMBER 2013

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Dane
Fond du Lac
Grant
Marathon
Milwaukee
Outagamie
Waukesha

TUESDAY, SEPTEMBER 3, 2013

9:45 a.m.	12AP958	-	Milwaukee County v. Mary F.-R.
10:45 a.m.	11AP2833-CR	-	State v. Jacqueline R. Robinson
1:30 p.m.	11AP2733-CR	-	State v. Minerva Lopez

WEDNESDAY, SEPTEMBER 4, 2013

9:45 a.m.	11AP1956	-	James E. Kochanski v. Speedway Superamerica, LLC
10:45 a.m.	10AP3015	-	Frank J. Sausen v. Town of Black Creek Board of Review
1:30 p.m.	{#11AP2424-CR-		State v. Nancy J. Pinno
	{#12AP918	-	State v. Travis J. Seaton

WEDNESDAY, SEPTEMBER 11, 2013

9:45 a.m.	10AP1639-CR	-	State v. Erick O. Magett
10:45 a.m.	11AP2774	-	Attorney's Title Guaranty Fund, Inc. v. Town Bank
1:30 p.m.	11AP2597	-	Associated Bank N.A. v. Jack W. Collier

WEDNESDAY, SEPTEMBER 18, 2013

9:45 a.m.	11AP1045	-	Thomas D. Nowell v. City of Wausau
10:45 a.m.	11AP2698-CR	-	State v. Curtis L. Jackson
1:30 p.m.	11AP3009-D	-	Office of Lawyer Regulation v. Roger G. Merry

In addition to the cases listed above, the following cases are assigned for decision by the court on the last date of oral argument based upon the submission of briefs without oral argument:

2011AP387-D - Office of Lawyer Regulation v. Michael M. Rajek
2011AP1767-D - Office of Lawyer Regulation v. Bridget E. Boyle

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 3, 2013
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Victor Manian, presiding.

2012AP958 Milwaukee Co. v. Mary F.-R.

This case involves constitutional challenges to the involuntary commitment of a woman under Wis. Chapter 51, the state's mental health commitment law.

The Supreme Court reviews two issues:

- Under State v. Bush, 2005 WI 103, 283 Wis. 2d 90, 699 N.W.2d 80, is a facial challenge to the constitutionality of a statute forfeited where the issue was presented to the circuit court, but not as a constitutional challenge, and where the constitutional argument does not challenge the entire statutory chapter?
- Does Wis. Stat. § 51.20(11), which provides a jury of only six people and requires only a five-sixths verdict for persons subject to involuntary commitment, violate equal protection, given that Chapter 980 provides persons subject to involuntary commitment a jury of 12 and requires a unanimous verdict?

Some background: Police brought Mary to the Milwaukee County Mental Health Complex (MCMHC) after a neighbor called police at about 4:30 a.m. one day in 2011. The neighbor reported that Mary had thrown a bucket of water on a window of the neighbor's house and had threatened to shoot someone as she held an iron pipe or pole.

While investigating, police discovered Mary's home was barely habitable – the carpet appeared to be wet and had a mildew smell. The only things in the living room were two pails of water. There was no food in the apartment. All the appliances had been unplugged and their cords had been taken out and lined up. The stove had been dismantled and there were no lights or electrical power in the apartment. The officers did not find a gun. Mary was taken to the MCMHC.

Milwaukee County filed a petition for an involuntary commitment. At the initial probable cause hearing before a court commissioner, Mary made the following statement: "You'll hear a different story about what happened on that ward, and five 12-person jury demands—or six." At that same hearing, the court accepted Mary's *pro se* written filing, which stated that it was a "12 person jury trial demand."

At a subsequent probable cause hearing before a circuit court judge, Mary again orally requested a 12-person jury: "I want a 12-person jury demand." Mary's counsel never filed a formal demand for a 12-person jury.

The court held a jury trial on Dec. 8, 2011, slightly more than a week after the initial probable cause hearing. At the subsequent trial on the county's petition, the circuit court

empaneled a jury of six persons, pursuant to Wis. Stat. § 51.20(11). Neither Mary nor her attorney objected to the jury.

The jury found that the county had met its burden of proof, that Mary was mentally ill, that she was dangerous to herself and/or others, and that Mary was a proper subject for treatment. The circuit court entered a written order of commitment based on the jury's findings.

On appeal Mary argued, among other things, that the six-person jury and five-sixths vote provisions in Wis. Stat. § 51.20(11) violated her equal protection rights because a person subject to a commitment under Wis. Stat. ch. 980 is entitled to a 12-person jury that must reach a unanimous verdict.

The Court of Appeals concluded that Mary had forfeited the constitutional argument because (1) she had not argued the equal protection challenge in the circuit court and (2) she had accepted the six-person jury without objection.

Mary argued that because she was making a facial challenge to the six-person and five-sixths provisions of the statute, the challenge went to the circuit court's subject matter jurisdiction and could not be forfeited, even if not raised initially in the circuit court. Mary relied on Bush, 283 Wis. 2d 90, ¶¶14-19, and State v. Campbell, 2006 WI 99, ¶45, 294 Wis. 2d 100, 718 N.W.2d 659, as support for this categorical interpretation of the law.

However, the Court of Appeals interpreted Bush to have a much narrower scope and distinguished it from this case. It therefore found her constitutional challenge to have been forfeited and refused to address the substance of her challenge.

Mary has asked the Supreme Court to address the scope of the Bush decision and the substance of her equal protection challenge to the involuntary civil commitment law.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 3, 2013
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Paul V. Van Grunsven, presiding.

2011AP2833-CR State v. Robinson

In this case, the Supreme Court examines if a defendant's double-jeopardy rights were violated when the circuit court increased the total period of initial incarceration one day after imposing the original sentence.

Some background: On Jan. 22, 2011, the defendant, Jacqueline R. Robinson, was charged with possession of controlled substances – narcotic drugs – contrary to Wis. Stats. §§ 961.41(3g)(am), and 939.50(3)(i) and battery to police officer, contrary to Wis. Stats. § 940.20(2) and 939.50(3)(h). Robinson eventually entered guilty pleas to the charges.

On May 10, 2011, the Milwaukee County Circuit Court, Judge Paul R. Van Grunsven presiding, sentenced Robinson to 42 months imprisonment (18 months initial confinement/24 months extended supervision) concurrent to any other sentence on one count and to 60 months imprisonment (24 months initial confinement/36 months extended supervision) concurrent to any other sentence on two other counts.

The next day, the judge *sua sponte* recalled this case and extended the sentence on the second two counts to 69 months imprisonment (33 months initial confinement/36 months extended supervision), concurrent to any other sentence.

On Nov. 14, 2011, Robinson filed a Rule 809.30 post-conviction motion to restore the prior sentence, asserting that the court violated the double-jeopardy clause of the U.S. and Wisconsin constitutions. The court denied the motion, finding there was no violation of the double-jeopardy clause because it had a mistaken understanding of the defendant's sentence in another case. In its remarks changing the sentence, the circuit court advised the parties it had made a mistake because it was under the impression a previously imposed sentence was consecutive when in fact was concurrent.

The trial court said this case was consistent with State v. Burt, 2000 WI App 126, 237 Wis. 2d 610, 614 N.W.2d 42 in that the court did not increase the sentence upon reflection, but instead increased it because the court was under the mistaken impression about another sentence. The Court of Appeals affirmed the conviction and the trial court's decision to deny the motion.

Robinson contends her state and federal constitutional rights against double jeopardy were violated when the circuit court increased her sentence, arguing that the Court of Appeals' decision in this case is in conflict with an unpublished Court of Appeals' decision, State v. Crewz, (2007AP2381-CR).

In Crewz, two days after the initial sentencing, the case was recalled and the circuit court altered the sentence to provide it was consecutive rather than concurrent. In Crewz, the court could not determine the trial court made a good faith mistake and it posed a sentence contrary to what was clearly its original intent. Under the circumstances, the Crewz court concluded resentencing was impermissible.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 3, 2013
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Dane County Circuit Court decision, Judge Nicholas McNamara, presiding.

2011AP2733-CR State v. Lopez

This case examines the interplay of a trial court's discretionary power to accept a plea withdrawal and Wis. Stat. § 908.08, which allows child-abuse victims under the age of 16 to testify by video. More specifically, the Supreme Court reviews a Court of Appeal's decision regarding the determination of prejudice where the child victim turned 16 while the case was pending.

Some background: In October 2008, the state accused Minerva Lopez of physically abusing a girl who was 14 when the alleged abuse occurred. Staff at a child advocacy center in Madison recorded several interviews with the girl about the crimes. There were three interviews in total; two were conducted within a month of the girl being rescued from the abusive living situation. In them, the girl gives detailed descriptions of each act of abuse, which may have lifelong effects, including permanent disfigurement, scarring, and limb damage.

Lopez initially pleaded not guilty or not guilty by reason of mental disease or defect. The state filed a pretrial notice of its intent to introduce audio-visual recordings of the interviews. The state sought to admit the interviews at trial pursuant to § 908.08, which creates a hearsay exception for the admission of recorded statements of children as a means of having them avoid mental and emotional strain that could be caused by giving direct testimony at trial. State v. Snider, 2003 WI App 172, ¶13, 266 Wis. 2d 830, 668 N.W.2d 784. The court may admit the recordings if certain criteria are met; among them is that the trial begin before the child's 16th birthday. *See* § 908.08(3)(a) and (4).

The circuit court granted the state's motion, finding the recordings satisfied the criteria in § 908.08. In November 2009, pursuant to a plea agreement, Lopez pled no contest to six counts of child abuse.

In May 2010, prior to sentencing, Lopez, by new counsel, filed a formal motion to withdraw her pleas. Lopez alleged in part that the pleas were unknowing, and that Lopez was rushed into making a decision regarding the plea. At the hearing, Lopez testified she wanted to go to trial. She said she had language difficulties with her first attorney because he did not speak perfect Spanish and did not use an interpreter when he talked with her. She said her attorney told her just before the plea that she should plead and if she did not take the plea that she would not be allowed to testify against her husband in another case. She said she felt the pressure by her attorney to plead, and she also said she did not understand the plea hearing very well.

The trial court, Judge Nicholas J. McNamara presiding, denied Lopez's motion for plea withdrawal. The trial court concluded that Lopez had established a fair and just reason for plea withdrawal. However, he agreed with the state's argument that the state would be substantially prejudiced because, with the passage of time since Lopez's pleas, the girl had turned 16 and the state would no longer be able to introduce the recorded statements under § 908.08. The court noted concerns that the girl would not remember the specific details of the abuse and that it could

be traumatic for her to have to testify against her parents. Accordingly, the court denied the motion.

After sentencing, Lopez moved the court to reconsider its decision denying her presentencing motion to withdraw her pleas. The court denied the motion. Lopez appealed and a divided Court of Appeals reversed. The Court of Appeals ruled that the Legislature, in enacting Wis. Stat. 908.03(3)(a), made the policy decision that a witness no longer needs the protection afforded to children younger than 16 years old.

The Court of Appeals acknowledged that a decision to grant or deny a motion to withdraw a plea is within the circuit court's discretion, citing State v. Rushing, 2007 WI App 227, ¶16, 305 Wis. 2d 739, 740 N.W.2d 894; State v. Bollig, 2000 WI 6, ¶34, 232 Wis. 2d 561, 605 N.W.2d 199 (if the defendant demonstrates a fair and just reason to withdraw his or her plea, the burden shifts to the state to show that the state would be substantially prejudiced by plea withdrawal).

The Court of Appeals was not persuaded by the state's reliance on two cited cases, Bollig 232 Wis. 2d 561, ¶¶42-46 and Rushing, 2007 WI App 227, 305 Wis. 2d 739, 740 N.W.2d 894 explaining that: (1) those plea withdrawal cases do not involve the inadmissibility of recorded statements under § 908.08 due to a child turning 16, and (2) to the extent they deal with prejudice following from a faded memory, the cases involve much younger children where that problem is far more likely.

In addition to contending that the Court of Appeals' decision conflicts with Bollig and Rushing, the state says it violates the principle that it is within the trial court's discretion to allow a defendant to withdraw her plea before sentencing. *See* State v. Jenkins, 2007 WI 96, ¶29, 303 Wis. 2d 157, 736 N.W.2d 2.

Lopez contends that at the plea withdrawal hearing, the state only presented evidence regarding the girl's age, not the state of her memory. She notes the trial court found that the girl was physically and mentally able to testify in person and had done so in another case in which she was the victim of child abuse.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 4, 2013
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge John Siefert, presiding.

2011AP1956 Kochanski v. Speedway Superamerica

In this case, the Supreme Court examines the "absent witness" jury instruction, which effectively allows jurors to presume that the party who has elected not to call certain witnesses is hiding relevant, adverse information from them.

Some background: James Kochanski suffered a broken arm and wrist injury when he slipped and fell on a snow-covered curb at a Speedway station in Milwaukee. The curb was painted yellow, but Kochanski didn't see it because it was covered with snow.

Kochanski and his wife sued Speedway for negligence and violation of Wisconsin's safe place statute. The case was tried to a jury. Kochanski, his wife, and two of his treating physicians testified at trial. The Kochanskis' attorney also offered into evidence Speedway's interrogatory responses indicating there were five Speedway employees working at the time James fell. Speedway did not call any witnesses at trial. Instead it played store surveillance footage of the accident. Speedway explained during its opening statement that it would not be calling witnesses because the video was sufficient to prove Speedway was not negligent.

Given Speedway's decision not to call any witnesses, the Kochanskis requested that the trial court give Wis. JI-Civil 410 to the jury. The instruction provides:

If a party fails to call a material witness within [its] control, or whom it would be more natural for that party to call than the opposing party, and the party fails to give a satisfactory explanation for not calling the witness, you may infer that the evidence which the witness would give would be unfavorable to the party who failed to call the witness.

The trial court decided to give the instruction over Speedway's objection. During closing argument, the Kochanskis' attorney commented on the fact that Speedway had not called any witnesses and suggested Speedway was withholding information from the jury. The jury concluded Speedway was negligent in failing to maintain its premises. It found Kochanski was not negligent. Speedway filed a motion to set aside the verdict and for a new trial. The trial court denied that motion.

Speedway appealed, and the Court of Appeals reversed, concluding that the trial court erred in giving the absent witness jury instruction to the jury because it allowed the jury to presume Speedway was deliberately hiding relevant, adverse information.

The Court of Appeals noted that while a trial court has broad discretion to decide whether to give a particular jury instruction, it must exercise that discretion to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence. The court went on to note that the absent witness instruction should be given only if the uncalled witnesses are material and within the party's control or it would "more natural" for the party to call those witnesses and the party fails to satisfactorily explain the witnesses absence.

The Court of Appeals noted Speedway chose to use a videotape to prove it was not negligent, and it argued the videotape showed that conditions on the premises were kept up to a reasonably safe standard and that Kochanski fell as a result of his own negligence.

The Kochanskis argue that the trial court appropriately gave the absent witness instruction. They argue the Court of Appeals erred in concluding that there was not a sufficient showing the uncalled witnesses were material, in saying it was not "more natural" for either party to call Speedway's former employees because they were equally available to both parties, and that the Kochanskis did not sufficiently show Speedway failed to satisfactorily explain the witnesses absence.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 4, 2013
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed an Outagamie County Circuit Court decision, Judge Michael W. Gage, presiding.

2010AP3015 Sausen v. Town of Black Creek Bd. of Review

This case involves a challenge to the assessment of some land used for hunting in the town of Black Creek in Outagamie County. The Supreme Court is expected to consider whether an assessment review board's classification of property is entitled to a presumption of correctness in the same way as the determination of the fair market value of the property. The court will also consider whether the classification of the land at issue as "productive forest land" was correct – either with or without the presumption.

Some background: There are two primary determinations that must be made in assessing a piece of real property for tax purposes. First, the property must be classified according to its nature or use. Second, the full value (fair market value) of the property must be determined.

The assessed value of 10 acres of Frank J. Sausen's property increased 150 percent, from $11,000 in 2008 to $27,500 in 2009. Sausen does not dispute that the $27,500 valuation represents the fair market value or full value of the land. He nonetheless challenged the assessment, arguing that the land was improperly classified by the assessor as "productive forest land." Sausen argued that the property would have been more properly classified as "undeveloped land." This would have had a substantial impact on the amount of taxes he was required to pay because "productive forest land" is taxed at 100 percent of its value while "undeveloped land" is assessed at 50 percent of its full value.

At a hearing on Sausen's challenge, the town Board of Review heard testimony from both the town's assessor and Sausen. The Board also considered aerial maps of the area. One of the maps came from the Wisconsin Department of Natural Resources (DNR) and it listed the area including Sausen's property as "forested wetlands." The second map came from the U.S. Department of the Interior, which described the land at issue as part "woodland" and part "wooded marsh or swamp." Both Sausen and the assessor testified about the maps and the nature of the property. Sausen emphasized the wetlands and swamp portions of the government designations, while the assessor focused on the terms "forested" and "wooded." The assessor testified that Sausen's property was essentially covered by trees and that the assessor considered the woods on the property to be "low-grade cedar."

Ultimately, the Board voted to deny the reclassification of the property sought by Sausen. Sausen filed a certiorari petition in the Outagamie County Circuit Court, which denied the petition and affirmed the Board's decision.

The Court of Appeals affirmed, concluding that it had been Sausen's burden to present evidence that the property was not "productive forest land." It concluded that the application of such a presumption was supported by Wis. Stat. § 70.47(8)(i), which provides, in pertinent part: "The board shall presume that the assessor's valuation is correct. That presumption may be rebutted by a sufficient showing by the objector that the valuation is incorrect."

Sausen had asserted that there was no evidence in the record that the property met the statutory definition of "productive forest land." He contends that the Court of Appeals improperly relied on Wis. Stat. § 70.47(8)(i) to place a burden on him to show that the classification by the assessor was incorrect. He argues that the presumption of correctness in that statutory section extends only to the assessor's valuation, and not to the assessor's classification, which must be supported by sufficient evidence in the record developed before the board of review. Sausen asserts that the Court of Appeals' decision implicitly extended that presumption to classifications and therefore extended the law.

The Board of Review argues that the Court of Appeals did not really extend the presumption of correctness beyond existing law. It acknowledges the standard of review cited by Sausen in ABKA Ltd. Partnership v. Board of Review of Village of Fontana-On-Geneva Lake, 231 Wis. 2d 328, 335-36, 603 N.W.2d 217 (1999). It notes, however, that in deciding whether there is sufficient evidence to sustain an assessment, "'[t]he presumptions are all in favor of the rightful action of the Board.'" ABKA Ltd. P'ship, (quoting State ex rel. Boostrom v. Board of Review, 42 Wis. 2d 149, 155, 166 N.W.2d 184 (1969)). Indeed, it contends that the presumption of correctness extends to both classification and valuation determinations. See Peninsular Power Co. v. Wisconsin Tax Commission, 195 Wis. 231, 218 N.W. 371 (1928).

Even without the presumption of correctness, the Board argues that the testimony of both Sausen and the assessor, as well as the maps presented during the hearing, were sufficient to render the Board's classification a "reasonable view of the evidence." Thus, the Board essentially argues that even under the standard utilized by Sausen, its decision must be upheld.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 4, 2013
1:30 p.m.

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Fond du Lac County Circuit Court, Judge Richard J. Nuss, presiding.

2011AP2424-CR/ State v. Nancy J. Pinno
2012AP918 State v. Travis J. Seaton

In this certification involving two cases, the Supreme Court examines whether the failure to object to the closure of a public trial under the Sixth Amendment is to be analyzed on appeal under the forfeiture standard or the waiver standard.

Some background: The Court of Appeals has concluded that in each of these cases Fond du Lac County Circuit Court, Judge Richard J. Nuss presiding, removed the public from the courtroom during jury selection without complying with the four-part Waller test.

Under Waller v. Georgia, 467 U.S. 39 (1984), the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

In State v. Pinno, the circuit court stated at the outset of the trial: "Other than the jury, nobody will be in the courtroom… I want no one else in here during the entire *voir dire* process until the jury is selected… I want no press in here either…"

Nancy Pinno's trial counsel did not object to the closure. Pinno filed a post-conviction motion for a new trial on the grounds that her constitutional right to a public trial was violated by the court's exclusion of the public during jury selection. The circuit court denied the motion after an evidentiary hearing, concluding that any error was harmless.

In State v. Seaton, the same circuit court judge excluded the public from the courtroom during jury selection, stating: "If it becomes necessary… I'm just going to excuse everybody in the courtroom, that's the way it's going to be…"

Travis Seaton's trial counsel did not object to the closure. Seaton filed a post-conviction motion for a new trial on the grounds that his constitutional right to a public trial was violated by the court's exclusion of the public during jury selection.

The circuit court denied a request for an evidentiary hearing on the motion as well as a request for the substitution of another judge to hear the motion. The court then concluded that the right to a public trial is not absolute, and that any violation was trivial.

On appeal, the Court of Appeals noted that only two exceptions excuse the closure of a public trial from being a constitutional violation. State v. Vanness, 2007 WI App 195, ¶9, 304 Wis. 2d 692, 738 N.W.2d 154. The first is where the trial court complies with the four-part test set forth in Waller. The trial court did not do so here. The second exception is where an unjustified closure (i.e., one that does not meet the Waller test) is trivial. A closure is trivial if it does not violate the core values of the Sixth Amendment, which are: (1) to ensure a fair trial; (2) to remind the prosecutor and judge of their responsibility to the accused and the importance of

their functions; (3) to encourage witnesses to come forward; and (4) to discourage perjury. The closure of a trial that is unjustified and not trivial is considered a structural constitutional error subject to automatic reversal. *See* State v. Ford, 2007 WI 138, ¶43 & n.4, 306 Wis. 2d 1, 742 N.W.2d 61.

The Court of Appeals noted that it is undecided in Wisconsin law, and unsettled among other jurisdictions, as to whether a defendant's failure to timely object to a trial closure should be considered forfeiture or waiver of the error.

Forfeiture is the act of failing (either accidentally or strategically) to assert a right, whereas waiver is the act of affirmatively and deliberately relinquishing a right. Thus, if the right to a public trial is a forfeitable right, then it may be lost by a failure to object at trial. If the right to a public trial is a waivable right, then it is not lost by a failure to object at trial.

Pinno and Seaton argue that, as the right to public trial is a structural constitutional right, it can only be waived through an intentional relinquishment of the right. The state argues that the forfeiture rule should apply because an objection at trial would allow the circuit court to take corrective action and avoid appellate review.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 11, 2013
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed an Grant County Circuit Court decision, Judge George S. Curry, presiding.

2010AP1639-CR State v. Magett

This case involves the criminal defense of not guilty by reason of mental disease or defect (NGI). When a defendant asserts an NGI defense, the trial ordinarily has two phases: (1) a guilt phase to determine whether the defendant committed the crime charged, and (2) a mental responsibility phase to determine if the defendant should be held not responsible because of a mental disease or defect. The state bears the burden of persuasion on the first phase, but the defendant bears the burden of persuasion on the second phase.

This case examines whether a court may summarily refuse to hold the second phase if the trial court determines that the defendant will not present sufficient evidence to create a jury question. The Supreme Court is expected to determine whether the circuit court acted properly in refusing to conduct the second phase of the NGI trial and whether, as the Court of Appeals determined, any error in not holding the second phase was harmless.

Some background: Erick O. Magett was convicted of battery by a prisoner. Magett claimed in defense that he should not be responsible for punching corrections officers who entered his prison cell because his mental disease or defect had prevented him from knowing what he was doing when he punched them. He asserted that he had blacked out at the time the officers had entered the cell to remove him, and the next thing he remembered was being locked up.

The altercation occurred when a prison guard "extraction team" entered Magett's cell because he had covered a closed-circuit camera in violation of prison rules. Magett indicated he covered the camera because his requests for medical care for a fractured pelvis and back injury were being ignored and he was not receiving meals. Magett was under special restrictions at the time of the altercation because a letter he sent to the warden was viewed as a threat. The letter stated that someone would "end up getting hurt" if he didn't receive adequate medical care.

The restrictions provided that guards would not bring meals into Magett's cell unless he first sat cross-legged on the floor at the back of his cell, facing the rear wall with his hands clasped behind his head. Magett said he could not assume that position due to his injuries. As a result, no meals were provided to him for two days.

Before the extraction team entered the cell, Magett had refused to place his hands through an opening in the cell door so he could be handcuffed. A number of the officers slipped because Magett had smeared hand cream on the floor. After a brief altercation, the officers were able to restrain Magett and remove him from the cell. Despite having worn a face shield, one of the guards suffered a cut under his chin, apparently from one of Magett's punches.

In response to the state's charges, Magett entered an NGI plea. While the jury was deliberating whether Magett was guilty at the end of the first phase of the trial, the court and Magett's counsel discussed how the second phase would proceed. The jury came back with a guilty verdict shortly thereafter.

At that point, the court asked Magett's counsel what evidence she intended to present in support of Magett's NGI defense. Counsel informed the court that she did not intend to call either the court-appointed medical expert or the defense's own medical expert. She stated that Magett would again take the stand and testify that he had "blacked out" and that "he was out of it" during a part of the altercation. Counsel further stated that she expected to show the videotape of the incident, which the state had already played for the jury during the first phase of the trial.

After the discussion with counsel, the trial court indicated that it would not proceed to the second phase. It concluded that without any medical expert testimony and with only the evidence described by defense counsel, no reasonable jury could find that Magett could meet his burden of persuasion on the NGI defense. Since Magett could not meet his burden, the circuit court proceeded to enter a judgment of conviction based on the jury's guilty verdict in the first phase.

Magett appealed, arguing that the circuit court did not have the authority to refuse to hold the mental responsibility phase of the NGI trial, and that its error in denying Magett that part of the trial was not harmless.

The Court of Appeals affirmed, choosing not to decide whether the circuit court had acted properly in refusing to hold the second phase of the trial. It determined that even if that refusal had been improper, the error was harmless because the evidence cited by Magett's attorney would not have met the legal standard for an NGI defense.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 11, 2013
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed an Waukesha County Circuit Court decision, Judge J. Mac Davis, presiding.

2011AP2774 Attorney's Title Guaranty Fund v. Town Bank

This case involves two issues arising from competing efforts by two banks to recover assets from the same borrower – a Milwaukee landlord who failed to pay back loans, filed for bankruptcy and became entangled in a legal battle with his own lawyer.

At the request of Heartland Wisconsin Corp. (Heartland), the Supreme Court reviews a Court of Appeals' decision affirming a circuit court order granting summary judgment in favor of Town Bank.

More specifically, the Court examines:

- whether an enforceable creditors lien attaches to personal property acquired after a ch. 816, Stats., supplementary proceeding has been held.
- whether the fact that the supplemental commissioner's order and proof of service were not filed with the clerk of court rendered Town Bank's creditor's lien unenforceable.

Some background: On Feb. 13, 2006, Town Bank obtained and docketed a judgment against Timothy Brophy, Jr., for $1.6 million. Two days later Town Bank obtained a supplemental commissioner's order requiring Brophy to appear at a supplementary proceeding. Town Bank served the order on Brophy on Feb. 17, 2006. However, the order and proof of service were not filed with the clerk of court.

The supplementary proceeding was held on March 9, 2006. In July 2006, Brophy's attorney sued Brophy for unpaid legal fees. Brophy filed counterclaims and a third-party complaint against his attorney and the insurer for legal malpractice. In May or June of 2007, Heartland provided Brophy two loans totaling $222,000 which he said he was going to use to pay a settlement related to a class action lawsuit. As security for the loans, Brophy assigned to Heartland his interest in any potential proceeds that might result from the legal malpractice suit. Brophy subsequently defaulted on both loans.

Brophy filed for bankruptcy in August of 2007. In April of 2008, Town Bank filed a claim in the bankruptcy asserting its rights to the unpaid docketed judgment and its related creditor's lien against Brophy's personal property based on its February 2006 service of the supplemental commissioner's order for Brophy to appear at the supplemental proceeding.

Heartland first became aware of Town Bank's interest in Brophy's property from the claim Town Bank filed in the bankruptcy action. Brophy's bankruptcy action was dismissed in January 2009. In September 2009, Brophy's legal malpractice case settled. Heartland and Town Bank each claimed priority to the settlement funds Brophy received. Brophy's proceeds from the settlement were held in escrow by Attorney's Title Guaranty Fund, Inc. Attorney's Title commenced an interpleader action, and Heartland and Town Bank cross claimed against each other.

Heartland and Town Bank subsequently both moved for summary judgment. Town Bank claimed it had priority over the escrowed funds because it had an enforceable lien against Brophy's personal property and the lien attached to Brophy's proceeds from the legal malpractice suit.

Heartland argued that Town Bank's lien was an unenforceable "secret lien" and that any lien Town Bank might have had did not attach to property Brophy acquired after the 2006 supplementary proceeding. The circuit court granted summary judgment in favor of Town Bank and denied Heartland's motion. Heartland appealed, and the Court of Appeals affirmed.

The Court of Appeals said once Town Bank served Brophy with the order to appear at the supplementary proceeding, it had done all it was legally obligated to do to perfect its lien and at that point Town Bank's lien was valid and enforceable and became superior to any security interest Heartland would subsequently acquire related to the loans it made to Brophy in 2007.

The court reasoned since Town Bank's judgment remained unsatisfied at the time Brophy received the funds that are now in escrow, under § 816.08, Town Bank is entitled to those funds. Heartland argues both that Town Bank's lien is not valid because Town Bank did not ensure that the supplemental commissioner's order and proof of service thereof were filed with the clerk of court and that Town Bank is not entitled to a lien on any of Brophy's property that was acquired after the date of the supplementary proceeding.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 11, 2013
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed an Waukesha County Circuit Court decision, Judge Donald J. Hassin, Jr.*, presiding.*

2011AP2597 Associated Bank N.A. v. Collier

In this somewhat complicated and fact-specific case, the Supreme Court reviews two issues arising from a collection action involving competing lawsuits, liens, and judgments in Waukesha County:

- whether a creditor's right to obtain a common law creditor's/receiver's lien against a judgment debtor's personal property is conditioned upon docketing the judgment in the judgment and lien docket under Wis. Stat. § 806.10(1); and
- whether a judgment creditor is entitled to relief, in the form of a declaration that its judgment is effectively docketed in the judgment and lien docket, when the clerk accepts the docketing fee but fails to perform the ministerial duty of actually recording the judgment in the docket.

Some background: In December 2009, Associated Bank, N.A. (Associated), filed a foreclosure action seeking a deficiency judgment against Jack W. Collier. Associated won a nearly $11 million default judgment against Collier. Associated docketed the judgment on May 28, 2010.

SB1 Waukesha County LLC (SB1) purchased approximately $8.6 million of Associated's judgment and joined the underlying trial court action as a co-plaintiff. In September 2010, SB1 initiated supplementary proceedings under Wis. Stat. ch. 816 ("Remedies Supplementary to Execution") in an effort to collect its judgment.

SB1 obtained orders to appear against Collier and Jeffrey Keierleber, owner of Decade Properties, Inc. (Decade) and a frequent business partner of Collier's. SB1 obtained personal service of the order to appear on Keierleber on Sept. 22, 2010. However, it took many months to accomplish service of Collier. SB1 claims that Collier purposefully evaded service, whereas Decade claimed that SB1 was dilatory in its service efforts.

Soon after being served with the order to appear, Keierleber, Decade (which is wholly owned by Keierleber) and certain jointly-owned Keierleber/Collier businesses filed six lawsuits to collect on outstanding loans made to Collier or to jointly-owned Keierleber/Collier businesses. While still unserved with SB1's order to appear, Collier quickly accepted service of these six complaints, and the parties to those lawsuits quickly executed stipulations agreeing to judgment amounts in each. SB1 claims that these complaints and stipulated judgments were a scheme to avoid the SB1 judgment and take lien priority away from SB1.

One of these six judgments is at issue here. On Oct. 22, 2010, Decade filed the judgment and paid the fee to have it docketed and received a receipt. However, through administrative error, the circuit court clerk's office did not docket the judgment.

Decade, unaware that its judgment against Collier was undocketed, initiated supplemental proceedings against Collier. Decade obtained an order to appear for supplemental examination and, on Nov. 16, 2010, Collier accepted service of the order. On Nov. 22, 2010, Collier appeared for a supplemental examination by Decade. Meanwhile, it took SB1 until April 2, 2011 to obtain service on Collier, who then failed to appear as ordered. On June 10, 2011, the trial court found Collier in contempt.

Decade moved to intervene in SB1's action in an effort to assert its assumed lien priority. However, on June 29, 2011, Decade discovered that the circuit court clerk had failed to docket its judgment against Collier. The clerk docketed the judgment the same day Decade discovered the clerk's error.

Holding its prior-docketed judgment, SB1 filed a motion for turnover of various assets owned by Collier. These assets included all rights, title, and interest vested in Collier to unasserted counterclaims or affirmative defenses on his behalf, including those relative to his interests in the six new cases filed by Decade, including all potential claims against third parties.

Holding its later-docketed judgment, Decade filed a summary judgment motion arguing that it nevertheless had priority status over SB1 because it had served Collier with an order to appear at a supplemental examination before SB1 served Collier with its order to appear. According to Decade, the act of serving Collier with an order to appear created a senior lien regardless of whether its underlying judgment was docketed or not.

The trial court denied Decade's summary judgment motion and held that Decade's lien was subordinate to SB1's lien. The court further ruled that all SB1's liens were superior to Decade's and that any actions, proceedings, liens, or orders relative to Decade's undocketed judgment before June 29, 2011 (the date the clerk finally docketed Decade's judgment) that might affect SB1's supplemental proceedings or attempt to execute on the judgment were "held for naught." Further, the court granted SB1's motion for turnover, ordering that all rights, title and interest vested in Collier to unasserted counterclaims or affirmative defenses on his behalf, including those relative to his interests in the six new cases, including all potential claims against third parties, were now vested in, with exclusive possession and control granted to, the supplementary receiver. The trial court subsequently denied Decade's motion for reconsideration. Decade appealed, unsuccessfully.

A decision by the Supreme Court could clarify the law in this area, including the meaning and effect of "entering," "executing," and "executable" judgments; the meaning and effect of "perfecting" judgments and "perfecting" liens; and the question of whether, and of what priority, a lien may arise from a money judgment without that judgment ever being docketed.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 18, 2013
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversing an Marathon County Circuit Court decision, Judge Gregory E. Grau, Jr., presiding.

2011AP1045 Nowell v. City of Wausau

This case examines whether circuit court review of municipal decisions to not renew an alcohol license under Wis. Stats. § 125.12(2)(d) is pursuant to certiorari or a *de novo* hearing.

Under certiorari review, the circuit court's review is limited in scope. The record of the municipal proceeding is considered by the circuit court, and the circuit court will generally not overturn the municipality's decision if there was a reasonable basis for it. By contrast, a *de novo* hearing is conducted as if the original hearing had not taken place, and licensees or residents are not limited in the type of evidence presented to the municipality. As a result, the record at the municipal hearing may differ substantially from that at a hearing before the circuit court, and the circuit court renders a decision independent from the municipality's decision. In this case, the circuit court employed certiorari review, but the Court of Appeals mandated a *de novo* hearing.

Some background: On May 25, 2010, the city of Wausau notified Thomas D. Nowell and Suporn Nowell, doing business as "IC Willy's, LLC," that the city intended not to renew the bar's combined intoxicating liquor and fermented malt beverage license the following month.

As grounds for this decision the notice cited 51 police calls to the premises since October of 2009. Fourteen calls were about noise complaints. The notice also cited an earlier 15-day suspension for a "Girls Gone Wild" event, as well as multiple citations for disturbing the peace and allowing minors to be on the premises.

In June 2010 the city's public health and safety committee held a hearing at IC Willy's request. The committee recommended non-renewal of the license after determining that IC Willy's had violated § 125.12(2)(ag)1. and 2. The city accepted the committee's recommendation.

IC Willy's sought judicial review and demanded that the circuit court independently determine if the bar was entitled to license renewal. The circuit court concluded the scope of review under § 125.12(2)(d) was limited to matters reviewable by certiorari. The circuit court concluded the city kept within its jurisdiction, acted according to law, did not act arbitrarily, and based its decision on the evidence before it. IC Willy's appealed. The Court of Appeals reversed, concluding that the circuit court erroneously interpreted § 125.12(2)(d) to require certiorari review. It remanded with directions that the circuit court conduct any additional hearings needed to exercise its sound discretion on the renewal of IC Willy's license.

The Court of Appeals noted that liquor and beverage license renewals are governed by § 125.12(3), which permits local authorities to refuse to renew a license for various reasons, provided the municipality has given the licensee notice and the opportunity for a hearing. The statute sets forth the manner of the hearing before the governing municipal body and says that judicial review "shall be provided for in sub.(2)(d)."

The Court of Appeals said paragraph (2)(d) unambiguously states that on review the court must use the same procedures as in civil actions, but it said the practices applicable to

ordinary civil actions are not applicable to writs of certiorari. See State ex rel. Casper v. Board of Trustees, 30 Wis. 2d 170, 176, 140 N.W.2d 301 (1966). The Court of Appeals also said certiorari statutes usually include some provision specifying the manner in which return of the inferior tribunal's record is to be made, and there is no such provision in § 125.12(2)(d). Thus, the Court of Appeals reasoned paragraph (2)(d) requires a circuit court to independently determine whether a licensee is entitled to renewal.

The Court of Appeals said its conclusion that § 125.12(2)(d) provides a right to a *de novo* hearing is "a substantial departure from ordinary judicial review of a municipality's exercise of police power." The Court of Appeals remanded with directions that the circuit court conduct any additional hearings needed to exercise its sound discretion on the renewal of IC Willy's license.

The city argues the Court of Appeals' decision usurps municipalities' prerogative in the exercise of their police powers. It says the statutory mandate to prepare findings of fact, conclusions of law, and a recommendation for revocation, suspension or renewal hearings held before committees under § 125.12(2)(d)3. becomes meaningless if the licensees need merely seek *de novo* hearings by the circuit court under § 125.12(2)(d).

In an amicus brief, the League of Municipalities says the Court of Appeals' decision is contrary to well-established rules of statutory procedure and is not supported by legislative history, judicial history, or sound judicial policy.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 18, 2013
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judges Daniel L. Konkel and Richard J. Sankovitz, presiding.

2011AP2698-CR State v. Jackson

This case examines the holding in McMorris v. State and related Wisconsin case authorities in light of Wis. Stat. §§ 904.04(2)(b) and 904.05. The Supreme Court reviews whether homicide suspect Curtis L. Jackson's rights of compulsory process and fair trial were denied when his motion to enter evidence of the victim's reputation for violence was denied.

Some background: Jackson was charged with one count of first-degree intentional homicide by use of a dangerous weapon for the shooting death of Angelo McCaleb. Multiple witnesses, including Jackson, testified at Jackson's trial.

Although the details of the shooting and the events leading up to the shooting varied, it is undisputed that the events were triggered when Tanya Davis, a woman living at Jackson's house, borrowed Jackson's car to go to a bar on the evening of Nov. 4, 2008. Davis testified that while at the bar, she had drinks with McCaleb and his friend, Wayne Johnson.

Jackson called Davis while she was at the bar, asking her to return his car. Davis testified that she returned the car at around 10:30 p.m. and parked the car behind Jackson's house. Both McCaleb and Johnson drove behind Davis, but parked their car on the street and walked to the back of Jackson's house.

Jackson, McCaleb, and Johnson exchanged unpleasantries. Both McCaleb and Jackson walked back towards their respective cars. Jackson testified that he went to his car to retrieve a gun from the glove box because he feared an attack from McCaleb and Johnson. Jackson attempted to keep the gun hidden.

Jackson testified that he pushed McCaleb away from another female resident of his home because it appeared as though McCaleb was going to strike her. Jackson stated that McCaleb then angrily went back to his car and appeared to have retrieved something. Jackson then saw McCaleb "look me dead in the eye, comin' directly at me fast." Jackson testified that he told McCaleb not to "walk up on me," and then shot McCaleb because McCaleb was "closing ground."

Jackson called 911 to report the shooting. Jackson admitted to the shooting, but argued that his action was in self-defense. McCaleb died from the gunshot wound.

A jury found Jackson guilty of the lesser included offense of second-degree reckless homicide by use of a dangerous weapon. Jackson moved for a new trial, alleging, among other things, that the trial court erroneously denied admission of evidence of McCaleb's reputation for violence, and that trial counsel was ineffective for providing an inadequate proffer as to McCaleb's reputation for violence. The trial court denied the motion.

Jackson appealed, unsuccessfully. The Court of Appeals upheld the trial court's discretionary decision to exclude evidence of McCaleb's reputation for violence. The Court of Appeals noted that Jackson's trial counsel had moved to admit three prior incidents of assaultive behavior by McCaleb, which occurred in 1995, 2004 and 2008. Jackson admitted that he was

unaware of these incidents at the time he shot McCaleb, but argued that evidence of McCaleb's character trait was admissible under Wis. Stat. § 904.04(2) to show "motive, opportunity, intent and the absence of mistake or accident."

Citing McMorris v. State, 58 Wis. 2d 144, 205 N.W.2d 559 (1973), the Court of Appeals explained that "[w]hen the defendant seeks to introduce such evidence to establish his state of mind at the time of the affray, it must be shown that he knew of such violent acts of the victim prior to the affray."

Jackson claims that this application of McMorris precludes him from fully presenting his defense.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 18, 2013
1:30 p.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge - hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case has a practice in Monroe.

2011AP3009-D OLR v. Roger G. Merry

In this case, the Supreme Court examines whether Atty. Roger G. Merry violated SCR 22.03(6) and SCR 20:8.4(h) by willfully failing to provide relevant information and answer questions fully in the course of an investigation by the Office of Lawyer Regulation (OLR).

Some background: Merry, who was admitted to practice law in Wisconsin, represented the plaintiffs in an easement dispute among neighbors over access to parts of a private dirt road or driveway in New Glarus.

Jerome Fabish, the eventual defendant, lived near the midpoint of the block where the road looped through backyards. He barricaded the private drive where it crossed his property. The other neighbors wanted to be able to use the full length of the drive and hired Merry to fight their case after the village attorney said litigation may be necessary to establish easement rights. Fabish also retained counsel.

After settlement efforts failed, on Oct. 4, 2007, Merry filed a Summons and Complaint on behalf of his clients, Kurt Foster ("Foster"), et al. (collectively "plaintiffs") to determine claimed access rights over the property. Foster, et al. v. Fabish, et al., Green County Case No. 2007CV342 (the "easement action").

Throughout the litigation, Merry asserted both in written and oral statements to the court that his clients required an easement width of 14 feet, which was requested by the fire department and emergency medical service (EMS) for ingress and egress of fire and EMS vehicles and for the safety of fire and EMS personnel. Later, it was learned that there was no explicit requirement of a 14-foot easement for emergency vehicles.

The plaintiffs lost the easement action by summary judgment.

On Jan. 23, 2009, Fabish filed a grievance with the OLR regarding Merry's conduct, alleging that Merry had misrepresented facts to the court regarding the purported EMS requirement of a 14-foot easement.

The OLR investigated and eventually filed a complaint against Merry on Dec. 29, 2011.

The OLR's complaint alleged that Merry knowingly made a false statement of fact or law to a tribunal or failed to correct a false statement of material fact or law previously made to the tribunal by Merry, in violation of SCR 20:3.3(a)(1) (count one), and that Merry violated SCR 22.03(6) and SCR 20:8.4(h) by failing to cooperate with the OLR's investigative committee (count two). The OLR sought a 60-day suspension.

The matter proceeded to an evidentiary hearing before the referee.

The referee ultimately recommended dismissal of count one, concluding that Merry did not make any misrepresentation to the court when he stated that his clients wanted an easement

width of 14 feet, as requested by the fire department and EMS for necessary access for their vehicles and equipment. The OLR did not challenge this dismissal.

Regarding count two, the referee concluded the OLR had established the violation, and he recommended a public reprimand and costs. The referee determined that Merry was not fully forthcoming about his source of information regarding the 14-foot easement requirement.

Merry appealed, asking the Supreme Court to dismiss the complaint. He challenges the referee's findings and contends OLR failed to show sufficient evidence that he refused to cooperate.

Merry maintains he could not remember specifically who told him about the requirement aside from one of his clients, but that doesn't make him an unethical lawyer. The OLR maintains that a 60-day suspension of Merry's license to practice law is appropriate, noting prior reprimands.

The Supreme Court will determine if Merry violated the ethical code of conduct for lawyers, and if so, what the penalty shall be.